

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

March 9, 2006

Kevin W. Wilson, Jr.

Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Karl Haller, Esquire
Public Defender's Office
14 The Circle
Georgetown, DE 19947

James W. Adkins, Esquire
Department of Justice
114 E. Market Street
Georgetown, DE 19947

Edward C. Gill, Esquire
16 N. Bedford Street
P.O. Box 824
Georgetown, DE 19947

RE: State of Delaware v. Kevin W. Wilson, Jr.
Def. ID # 0012014953

Date Submitted: December 20, 2005

Dear Mr. Wilson and Counsel:

This is my decision on defendant Kevin W. Wilson, Jr.'s ("Wilson") motion for postconviction relief. Wilson was convicted of two counts of Rape in the First Degree, one count of Rape in the Second Degree, one count of Assault in the Second Degree, and four counts of Possession of a Deadly Weapon During the Commission of a Felony. The charges arose out of a night of partying by Wilson and two people he met at a bar, Naydean Cornish and Jorge Sierra. When the bar closed, Wilson invited Cornish and Sierra back to his apartment. After drinking alcohol and smoking marijuana for hours, Wilson hit Sierra and raped Cornish with a pool cue. I

sentenced Wilson to 78 years at level V, suspended after serving 48 years at level V for declining levels of probation. The Supreme Court affirmed Wilson's convictions on May 31, 2002.¹ Wilson filed his motion for postconviction relief on June 15, 2005. This is his first motion for postconviction relief and it was filed in a timely manner.²

Wilson has presented all of his grounds for relief in terms of claims of ineffective assistance of counsel or court error. Wilson was obliged to challenge the trial court's errors in his direct appeal, but did not do so. Therefore, they are procedurally barred pursuant to Superior Court Criminal Rule 61(i)(3) unless Wilson is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights.³ The State was represented at trial by James W. Adkins, Esquire ("Adkins"). Wilson was represented at trial and on appeal by Karl Haller, Esquire ("Haller"). Wilson is represented on his motion for postconviction relief by Edward C. Gill, Esquire ("Gill"). Haller filed an affidavit responding to Wilson's allegations.

DISCUSSION

Ineffective Assistance of Counsel

The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.⁴ In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a

¹*Kevin W. Wilson Jr., v. State of Delaware*, Del. Supr., No. 430, 2001, Steele, J. (May 31, 2002)(ORDER).

²Wilson's filing was timely because the Supreme Court mandate was not issued until June 18, 2002.

³ *Outten v. State*, 720 A.2d 547, 556 (Del. 1998).

⁴*Strickland v. Washington*, 466 U.S. 668 (1984).

two-part analysis.⁵ First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.⁶ Second, the defendant must show that the deficient performance prejudiced the defense.⁷ Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."⁸ It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing that representation.'"⁹ There is no procedural bar to claims of ineffective assistance of counsel.¹⁰

A. Self-Defense Instruction

Wilson argues that Haller should have requested a jury instruction on self-defense because he testified that Sierra hit him first. Wilson did not know Sierra and Cornish. Sierra and Cornish were friends. They went to the Greenwood Tavern for drinks. Wilson went there to drink and play pool. Sierra and Cornish were drinking and playing pool when Wilson came up to them and started talking about pool. Sierra and Cornish gave Wilson a ride back to his apartment after the bar closed. Wilson invited Sierra and Cornish in to continue drinking. Wilson went over to a friend's apartment

⁵*Id.* at 687.

⁶*Id.* at 687.

⁷*Id.* at 687.

⁸*State v. Coleman*, 2003 WL 22092724 (Del. Super. Ct.).

⁹*Coleman*, 2003 WL at *2, *quoting Strickland*, 466 U.S. at 689.

¹⁰*Coleman*, 2003 WL at *1, *citing State v. Johnson*, Del. Super. Ct., Cr.A. No. 97-10-0164(R1), Graves, J. (August 12, 1999) at 2; *State v. Grattis*, Del. Super. Ct., Cr.A. Nos. IN90-05-1017 to 1019, Barron, J. (December 28, 1995) at 7, *aff'd*, 637 A.2d 1174 (Del. 1997).

and got marijuana. All three drank alcohol. Sierra and Wilson also smoked marijuana. The testimony diverges at this point. Wilson testified that after having consensual sex with Cornish, he went to the bathroom to urinate. As he was finishing up, Wilson testified that Sierra hit him in the head with a pool cue. Wilson testified further that he grabbed Sierra, took the pool cue from him, hit him in the head with it, and then knocked him into the bathtub. Then, according to Wilson, Cornish hit him in the head with a pool cue. Wilson then ran to his friend's apartment for help. Cornish was, according to Wilson, still in his apartment when he left.

Cornish testified that Wilson hit Sierra with a pool cue when Sierra was going to the bathroom. Wilson then forced Cornish into the bedroom, made her undress, and then tried to put his penis in her anus. Unable to do that, Wilson forced Cornish to perform oral sex on him, causing her to vomit. Wilson then put his penis in Cornish's vagina. Finally, Wilson took the pool cue and put it in Cornish's vagina. Cornish grabbed the pool cue, pulled it out of her vagina, and ran to the door with Wilson in pursuit. Cornish hit Wilson in the head several times with the pool cue and was able to run to a neighbor's apartment. Sierra testified that, after drinking and smoking marijuana, he went into the bathroom and was knocked out.

The police found Wilson passed out on the front porch of his friend's apartment. His pants were down around his ankles. A pool cue was next to him. The police found Sierra unconscious in the bathtub. Cornish ran out of Wilson's apartment, naked from the waist down, to a neighbor's apartment, who let her in and gave her some clothes. Wilson later made incriminating statements to the police. He said, "when I hit him, then I felt power. I felt like an asshole and I think I raped that girl, and I apologize." Wilson wrote a letter to Sierra and Cornish. He apologized to Sierra for hitting him and to Cornish for "pushing myself on you against your will."

Wilson argues that the absence of a self-defense instruction had an overall negative effect on his defense, reasoning that, without the instruction, his version of the events became inconsistent with innocence and consistent with guilt.

Wilson would have been entitled to a jury instruction on self-defense if some credible evidence supporting this defense had been presented during the trial. The test is whether, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences that may be drawn from the evidence in favor of the accused, could a hypothetical, reasonable jury find the facts as the accused suggests.¹¹ Wilson's version of the events is that he had consensual sex with Cornish, a woman that he had known for only several hours, and that it was Sierra who hit him. Wilson's version is simply not credible. If the sex between Wilson and Cornish had been consensual, then there would have been no reason for Cornish to have run out of Wilson's apartment at 4:00 a.m., covered in vomit and naked from the waist down, screaming for help. If the sex had been consensual, then there would have been no reason for Wilson to have told the police that he "raped that woman" and to have apologized to Cornish for pushing himself on her against her will. There is no credible evidence that this was anything but a rape. The rape and the assault were connected in this case. If the part about the rape is not credible, then the part about the assault is not credible either. Moreover, if Sierra was the aggressor, then there was no reason for Wilson to have apologized to Sierra for hitting him. No reasonable jury could have found the facts as Wilson suggests them. Therefore, Wilson was not entitled to a jury instruction on self-defense and Haller was not deficient for not requesting such an instruction.

¹¹*Gutierrez v. State*, 842 A.2d 650 (Del. 2003).

B. Nurse Testimony

Wilson argues that Haller should have objected to Julie Gerhardt's testimony because she was a "junk expert" whose opinions were not disclosed to the defense in discovery. Wilson also argues that Haller's failure to hire, or to consider hiring, an expert to counter Gerhardt's testimony was an error. Wilson lastly argues that Haller should have challenged the scientific basis of Gerhardt's testimony.

Gerhardt was, according to Haller, identified by the State as an expert in the discovery. An expert witness is a person who has specialized knowledge, skill, experience or education.¹² Gerhardt certainly qualified as an expert witness. She is a registered nurse. Gerhardt is also a certified sexual assault nurse examiner. She works in the intensive care unit at Nanticoke Memorial Hospital. Gerhardt also is a member of a small team of nurses that handles sexual assaults in the emergency room. She examined Cornish after she was brought into the hospital and testified about the injuries to her face and the lack of injuries to her vagina. It was Gerhardt's opinion that Cornish could have been raped even though there were no injuries to her vagina. Haller cross-examined Gerhardt thoroughly about her opinion, and on several occasions he got her to state on the record that Cornish lacked any visible injuries. Thus, Haller made the point before the jury that Wilson is making now, which is how could a woman who was allegedly raped with a pool cue not have any visible evidence of injury to her vagina.

As to Wilson's claims that Haller should have sought to exclude Gerhardt's testimony and hired an expert to counter it, Wilson has not offered any persuasive reason to reject Gerhardt's testimony other than Wilson's own view that it is bizarre. He has also not proffered the opinion of

¹²D.R.E. 702.

an expert who would counter Gerhardt's testimony. In sum, Wilson has criticized Haller's efforts, but he has not offered a meaningful and realistic alternative to them.

C. Victim References

Wilson argues that Haller should have objected when Cornish and Sierra were referred to as "victims." Wilson contends that prejudice occurred as the jury became conditioned to thinking of the complaining witnesses as victims. Reference to a complainant as a "victim" is not objectionable in all cases where the commission of a crime is disputed; it is only objectionable in those cases where consent is the sole defense.¹³ Wilson testified that he hit Sierra in self-defense and that he had consensual sexual relations with Cornish. Even though Wilson's testimony was not credible, I do agree with him that Sierra and Wilson should not have been referred to as victims, and that Haller should have objected to it. However, I do not find that Wilson has demonstrated a reasonable likelihood that Haller's conduct prejudiced the outcome of the case. Sierra and Cornish were only referred to as victims a total of four times each during the trial. These were very isolated events and, in the context of a three-day trial, were highly unlikely to have affected the jury, particularly where Wilson himself treated Sierra and Cornish as victims by apologizing to Sierra for hitting him and to Cornish for raping her.

D. Jury Composition

Wilson argues that Haller should have had four jurors stricken from the panel. The first juror that Wilson believes that should have been excused was a correctional officer. It is Wilson's contention that this juror knew the defendant was incarcerated with the most dangerous pre-trial inmates, thereby implying the juror was pre-disposed to be prejudiced toward the defendant. Haller

¹³*Mason v. State*, 1997 WL 90780 (Del. Super. Ct.).

stated in his affidavit that he talked to Wilson about this juror and Wilson stated that he was satisfied with the juror.

The second juror that Wilson believes should have been excused was a teacher who thought the chief investigating officer had previously assisted her on a field trip. I questioned both the juror and the officer about this. The juror was not even positive that she recognized the officer. The officer stated that he does not participate in school field trips. He added that it might have been possible that the juror saw him during a field trip to the police station. I concluded that there was no problem with this juror at the time and I feel no differently now.

The third juror that Wilson believes should have been excused was a juror who stated that she went to school with Officer Michael Kirby. I questioned the juror and she stated she had not seen or spoken to Officer Kirby since high school. The juror also stated that she was not inclined to give his testimony any more or less weight merely because they had gone to high school together. I concluded that there was no problem with this juror at the time and I feel no differently now.

The fourth juror that Wilson believes should have been stricken from the panel was a black juror. Haller did exercise a peremptory challenge to strike this juror. When the State objected, I asked Haller for his reason for striking her. Haller said that Wilson did not like the way she looked at him. I found this reason insufficient and reseated the juror. Wilson appealed this issue to the Supreme Court, which held that it was proper to reseat the juror. Wilson also contends that it was improper of Haller to attempt to strike this juror because it led to the juror being prejudiced against Wilson. Wilson offers no evidence that this juror was prejudiced against him as a result of attempting to strike her. Without any evidence, this argument fails. I find no deficiency in the manner in which Haller handled jury selection.

E. Detective Sean Moriarty's testimony

Wilson argues that Haller should have objected to Detective Sean Moriarty's testimony because Moriarty was not identified as an expert in discovery. Detective Moriarty testified that the wounds on Wilson's back were not defensive wounds and that they were inconsistent with Wilson's version of the events. Haller stated he did not object because he believed that Moriarty did not have to be an expert to offer this testimony. Haller's contention is correct. A lay witness can offer opinions when they do not require specialized knowledge, skill, experience or training.¹⁴ Detective Moriarty's testimony was well within the limits on the type of opinion testimony that a lay witness may offer. The fact that Officer Moriarty's testimony was inconsistent with Wilson's version of the events is not an attack at all on Wilson's credibility. It was merely an obvious conclusion given the testimony of the other witnesses.

F. Wilson's Confession

Wilson argues that Haller should have retained an expert witness to testify why Wilson, who had a blood alcohol content of .17 and marijuana in his system, would falsely confess to crimes he did not commit. Wilson was not under the influence of either alcohol or marijuana when he made incriminating statements to the police and wrote the apology letter to Sierra and Cornish. Thus, Wilson's rationale for why he confessed simply did not exist when he actually confessed. Given this, Haller's decision not to offer such expert testimony was reasonable.

Wilson also argues that Haller should have attempted to explain to the jury why a person may falsely confess to a crime he did not commit. In support of his argument Wilson refers to a study that revealed that false confessions were a factor in 22 percent of the wrongful convictions in the

¹⁴D.R.E. 701.

United States.¹⁵ This is an interesting statistic, but it is, in and of itself, irrelevant. What is relevant is whether or not Wilson may have falsely confessed to the crimes in the case. Wilson has not offered any reason, rationale, or expert opinion for why he would have falsely confessed.

G. Jorge Sierra

Wilson argues that Haller failed to impeach Sierra with his medical records, which showed that Sierra had a .351 blood alcohol content and cocaine in his system. Wilson is incorrect. Haller did use this information to impeach Sierra. Haller cross-examined Sierra about his criminal record, about smoking marijuana, and about the amount of alcohol he consumed during the night. All of this questioning was designed to show Sierra was not a credible witness because he was under the influence of drugs and alcohol. While Haller did not mention Sierra's blood alcohol content, the jury certainly knew that Sierra used drugs and alcohol on the night in question.

Wilson also argues that this information could have convinced the jury that Sierra was so drunk that it was possible that he attacked Wilson for having consensual sex with his friend, Cornish. Haller did not bring up this scenario, but during his cross-examination of Sierra he did question Sierra about his prior violent and aggressive behavior. Thus, evidence about Sierra's violent tendencies was before the jury. I find no deficiency in Haller's examination of Sierra.

H. Meeting

Wilson argues that Haller should not have set up a meeting with Adkins for the three of them to discuss the case. Wilson, Haller and Adkins met together at the Courthouse during a case review. Wilson argues that this destroyed the attorney-client privilege and allowed Adkins insight into Wilson's case. Haller set up the meeting so that Wilson could hear for himself the evidence against

¹⁵Actual Innocence, *Scheck, Neufeld, Dwyer* (2001) p. 361.

him and to consider the State's plea offer. Haller was present during the meeting and protected Wilson's rights at all times. This meeting did not destroy the attorney-client privilege, nor is there a scintilla of evidence that suggests the meeting compromised Wilson's defense and placed him at a tactical disadvantage. I do not find that Haller was in error for setting up this meeting.

I. Motive

Wilson argues that Haller should have objected to testimony that he was attracted to black women and had not had sex for over a year. Wilson suggests that the statement led the jury to believe that he was more likely to commit the crimes because he had not had sex in over a year and because he was attracted to black women. Haller stated that he did not object to this testimony because Wilson made these statements to his best friend, Jason Crum, who repeated them to Detective Moriarty. Haller's position on this issue is correct. The statements came in pursuant to 11 Del. C. § 3507 and were not hearsay because they were an admission by Wilson under D.R.E. 801. These statements were relevant because they explained why Wilson may have been motivated to rape Cornish, who is black. This evidence was not, as Wilson argues, propensity evidence. There was simply no testimony at all that Wilson had ever raped anyone in the past and that, because of what he had done in the past, that he probably raped Cornish.

J. Objection

Wilson argues that Haller should have objected to Officer Kirby's testimony when he was reading from his report. He also argues that I should have stopped it. Officer Kirby was reading from his police report to answer Adkins' questions. Haller objected to this and I sustained the objection. Despite this, Officer Kirby continued to read from his report. Wilson argues that Haller should have objected again. While it is true that Haller could have objected again, and that I should

have stopped it even if Haller did not object, it was a harmless error. Wilson simply has not shown how this prejudiced his defense. The information that Officer Kirby provided from the time of the first objection to the end of his direct examination had either previously come into evidence or came into evidence through other testimony.

K. Separate and Cumulative Effect

Wilson argues that the cumulative effect of all of the alleged errors by Haller deprived him of his right to a fair trial. Having concluded that the alleged errors were either not errors at all, or were of so little consequence so as to have had no effect on the outcome of the trial, I conclude that this allegation is without merit.

CONCLUSION

Wilson's motion for postconviction relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley